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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2266/2013*, **

Communication submitted by:	Valery Rybchenko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	27 March 2013 (initial submission)
Document references:	Special Rapporteur's rule 97 decisions, transmitted to the State party on 3 July 2012 (not issued in document form)
Date of adoption of Views:	17 October 2018
Subject matter:	Sanction for participating in a peaceful assembly
Procedural issues:	Exhaustion of domestic remedies; State party's failure to cooperate
Substantive issues:	Arbitrary detention; fair trial; freedom of expression
Articles of the Covenant:	9 (1); 14 (2), (3) (b) and (d); 19 and 21
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication, dated 27 March 2012, is Valery Rybchenko, a national of Belarus born in 1963. The author claims to be a victim of a violation by Belarus of his rights under articles 9 (1), 14 (2), (3) (b) and (d), 19 and 21 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented by counsel.

The facts as submitted by the author

2.1 On 3 July 2011, the Zhlobin City Executive Committee organized a celebration of Belarus Independence Day. During the celebrations, the author distributed copies of leaflets, inviting individuals to participate in a countrywide silent protest action that was supposed

* Adopted by the Committee at its 124th session (8 October–2 November2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas Zimmermann.

to take place in the evening of the same day under the slogan "We have had enough". The author had downloaded the text of the leaflets from the Internet, because he was in agreement with the organizers of the silent protest action that there were no appropriate mechanisms in Belarus for individuals to express their opinions freely. At around 11.30 a.m., while he was distributing the leaflets, he was detained and taken to the Zhlobin Department of Internal Affairs, where a police report was drawn up stating that he had committed an administrative offence under article 23.34 (1) of the Belarus Code of Administrative Offences (violation of the established procedure for organizing or conducting a mass event or a "picket"). In the police report the author was accused of having distributed "printed materials of unknown format" with the slogan "We have had enough".

2.2 On 4 July 2011, the Zhlobin district court of the Gomel region found the author guilty of having committed an administrative offence under article 23.34 (1) of the Code of Administrative Offences. The court found he had violated the procedure for conducting a mass event established by the Law on mass events and sentenced the author to 15 days of administrative arrest.

2.3 On 5 July 2011, the author appealed the decision of the Zhlobin district court to the Gomel regional court, which rejected the appeal on 20 July 2011. On 16 September 2011, the author petitioned the Chair of the Gomel regional court to conduct a supervisory review of the prior decisions of the court. The Chair of the Gomel regional court dismissed his petition on 20 December 2011. The author submits that he has exhausted all available domestic remedies.

The complaint

3.1 The author claims that the State party's courts have ignored his argument that he could not be considered "an organizer" of a mass event within the meaning of the Law on mass events because the mass event of 3 July 2011 was organized by the Zhlobin City Executive Committee. The courts have also ignored the author's argument that the distribution of the printed materials did not fall within the scope of article 23.34 (1) of the Belarus Code of Administrative Offences because he did not organize or conduct the mass event for which he was distributing the leaflets. The author submits that there were no grounds for his arrest and detention and that, therefore, his rights under article 9 (1) of the Covenant have been violated.

3.2 The author submits that the administrative proceedings in his case fell short of the requirements of due process. The author claims that when he was detained, the police did not inform him of his rights and obligations, including his right to counsel. That is evidenced by the police protocol of the administrative offence, where next to his signature the author noted that his rights had not been explained to him. Also, neither the police nor the district court judge allowed the author's representatives to provide him with legal assistance during his detention and trial. The author complained about this to the national courts. However, both the appeal court and the court of supervisory review failed to address this violation. The author therefore claims that the State party has violated his rights under article 14 (3) (b) and (d) of the Covenant.

3.3 The author claims that by arbitrarily detaining him and sentencing him to 15 days of arrest, the State party violated his rights to freedom of expression and of peaceful assembly under articles 19 and 21 of the Covenant. He adds that the State party has failed to provide any justification as to why it was necessary to restrict his rights.

State party's observations on admissibility

4.1 By a note verbale dated 22 January 2013, the State party submitted that while it recognized the Committee's competence to receive and consider communications from nationals of Belarus who allege violation of their rights under the Covenant, it drew the Committee's attention to the unacceptability of ignoring and/or arbitrarily interpreting the Optional Protocol to the Covenant when registering and considering individual communications.

4.2 The State party expresses its utmost concern over the fact that the Committee systematically violates responsibilities entrusted to it in accordance with the Optional Protocol, by registering and considering individual communications from persons who have not exhausted domestic remedies (articles 2 and 5 (2b)) and from third parties, including those who are not subject to the jurisdiction of Belarus (articles 1 and 2).

4.3 The State party considers it unacceptable that the Committee adopts Views on individual communications that are registered in violation of the Optional Protocol pursuant to "an established practice and rules of procedure". It notes that the rules of procedure established by the Committee pursuant to article 39 (2) of the of the Covenant serve as the internal rules of the Committee, are not legally binding for States parties, and cannot be used to justify the Committee's violations of Optional Protocol provisions. All actions of the Committee within the framework of powers delegated to it, including the registration of communications, must fully conform to the provisions of the Optional Protocol. Actions taken outside of the framework of those powers (ultra vires) do not create any legal consequences for States parties.

4.4 The State party submits that in the spirit of good faith adherence to the Optional Protocol, it uses its right to not recognize Views adopted as a result of the Committee's unlawful actions. By exceeding its powers granted by the Covenant and its Optional Protocol, broadly interpreting its mandate and baselessly adopting the functions and powers of an international judicial body, the Committee undermines its own credibility and contradicts the goals of the Covenant and the Optional Protocol.

4.5 The State party notes that in accordance with the provisions of the Covenant, the Committee is not granted unlimited powers to interpret it. The Committee may interpret the Covenant exclusively in relation to specific situations submitted for its consideration. At the same time, the most significant interpretations are those that are made by States parties ("authentic interpretation").

4.6 The State party submits that the above-mentioned facts call for a reform of the Committee and more transparency in its work. The State party therefore urges the Committee to stop the practice of registration of individual communications in violation of the Optional Protocol and its adoption of Views on them. The State party also calls for a stop to the practice of misinforming the international community about the State party's alleged refusal to cooperate.

Author's comments on the State party's observations on admissibility

5.1 In a letter dated 27 October 2015, the author responded to the observations of the State party. He noted that he had not submitted a petition under the supervisory review procedure to the prosecutor's office because in accordance with the Committee's standards, legal remedies should be not only accessible but also effective. He submits that according to the Committee's practice, an effective remedy is one that can provide the author with compensation and offer him a reasonable prospect of redress. The author refers to the Committee's consistent jurisprudence that a supervisory review is a discretionary review process, limited to issues of legality, which the Committee does not consider constitutes an effective remedy for the purposes of exhaustion of domestic remedies.[1] The author notes that the European Court of Human Rights also does not consider the supervisory procedure to be an effective remedy.[2]

5.2 As for the arguments referring to the competence of the Committee to consider the communication, the author submits that by becoming a State party to the Optional Protocol, Belarus recognized not only the Committee's competence to issue decisions regarding the existence or absence of violations of the Covenant but also, in accordance with article 40 (4) of the Covenant, to transmit its reports and such general comments as it may consider appropriate to States parties. Under article 2 of the Covenant, the State party is also obliged to ensure that any person within its territory and subject to its jurisdiction has an effective remedy should his or her rights under the Covenant be violated. The role of the Committee

[1] The author refers to *Iskiyaev v. Uzbekistan* (CCPR/C/87/D/1418/2005).

[2] The author refers to *Tumilovich v. Russia*, application No. 47033/99, 22 June 1999.

ultimately includes interpreting the provisions of the Covenant and developing jurisprudence. By refusing to recognize the standard practices, methods of work and precedents of the Committee, Belarus in effect refuses to recognize the Committee's competence to interpret the Covenant, which contradicts the objective and goals of the Covenant.

5.3 The author submits that, having voluntarily accepted the jurisdiction of the Committee, the State party has no right to infringe on its competence and ignore its opinions for the reasons established in paragraphs 11 and 13 of the Committee's general comment No. 33 (2008) on the right to equality before courts and tribunals and to a fair trial. Based on the above, the State party is obliged not only to implement the decisions of the Committee, but also to recognize its standards, practices, methods of work and precedents. That argument is based on the most important principle of international law, *pacta sunt servanda*, according to which every treaty in force is binding upon the parties to it and must be observed by them in good faith.

Issues and proceedings before the Committee

Lack of cooperation by the State party

6.1 The Committee notes the State party's assertion that it adopts Views on individual communications that are registered in violation of the Optional Protocol, pursuant to "an established practice and rules of procedure", and that the State party will use its right not to recognize Views adopted by the Committee.

6.2 The Committee observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and article 1). Implicit in a State party's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination thereof, to forward its Views to the State party and to the individual (art. 5 (1) and (4)). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views. It is for the Committee to determine whether a case should be registered. By failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination of the admissibility and of the merits of the communications, the State party has violated its obligations under article 1 of the Optional Protocol.[3]

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's assertion that the author has failed to exhaust domestic remedies. The Committee also notes the author's submission that he has not submitted a petition under the supervisory review procedure to the prosecutor's office because he does not consider it to be an effective remedy. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[4] It also considers that requests

[3] See, for example, *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977–1981, 2010/2010), para. 8.2, and *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 6.2.

[4] See *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3;

for a supervisory review to the chair of a court directed against court decisions that have entered into force and that depend on the discretionary power of a judge constitute an extraordinary remedy, and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.[5] In the present case, the Committee notes that the State party has not provided any further information as to the effectiveness of the supervisory review process. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee notes the author's claim under article 14 (2) of the Covenant. In the absence of any information that his right to be presumed innocent until proved guilty was violated, the Committee considers that the author has failed to sufficiently substantiate these allegations, for purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that the author has sufficiently substantiated his claim under articles 9 (1), 14 (3) (b) and (d), 19 and 21 of the Covenant, for purposes of admissibility. Accordingly, it declares this part of the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that the State party has violated his rights under articles 19 and 21 of the Covenant by imposing an unjustified restriction thereon. The issue before the Committee is whether the author's rights under articles 19 and 21 were violated when he was arrested by the police in a public space while distributing leaflets inviting people to participate in a countrywide silent protest, found guilty of an administrative offence for violating the established procedure for conducting a mass event and sentenced to 15 days of administrative arrest. The Committee observes that the State party has submitted no observations on the merits of the communication and that, in those circumstances, due weight must be given to the author's allegations.[6] In the light of the material before it, the Committee considers that the State party imposed limitations on the author's rights, in particular on his right to impart information and ideas of all kinds, as provided for under article 19 (2) of the Covenant, and his right of peaceful assembly, as provided for under article 21. The Committee must therefore determine whether the restrictions imposed on the author's rights can be justified under article 19 (3) and the second sentence of article 21.

8.3 The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and that such freedoms are essential for any society (para. 2). They constitute the foundation stone for every free and democratic society (para. 2). The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as provided by law and are necessary (a) for the respect of the rights and reputation of others and (b) for the protection of national security or public order (*ordre public*) or public health or morals. Any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be

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Koreshkov v. Belarus (CCPR/C/121/D/2168/2012), para. 7.3; and *Abromchik v. Belarus* (CCPR/C/122/D/2228/2012), para. 9.3.

[5] See *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3; *Protsko and Tolchin v. Belarus* (CCPR/C/109/D/1919-1920/2009), para. 6.5; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3; *P.L. v. Belarus* (CCPR/C/102/D/1814/2008), para. 6.2; and *Jamshidian v. Belarus* (CCPR/C/121/D/2471/2014), para. 8.7.

[6] See, for example, *Samathanam v. Sri Lanka* (CCPR/C/118/D/2412/2014), para. 4.2; and *Diergaardt et al. v. Namibia* (CCPR/C/69/D/760/1997), para. 10.2.

directly related to the specific need on which they are predicated.[7] The Committee also recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.[8]

8.4 The Committee notes that the author was sanctioned for distributing leaflets about a countrywide silent protest on the basis of the finding by the police and the district court that he had violated the procedure for organizing and conducting a mass event established by the Law on mass events. The Committee notes the author's explanation that he did not organize or conduct the event, but rather downloaded the leaflets from the Internet and distributed them during public celebrations of Independence Day. The Committee notes that neither the State party nor the domestic courts have provided any explanations as to why such restriction was justified pursuant to the conditions of necessity and proportionality set out in article 19 (3) of the Covenant, and whether the penalty imposed — 15 days of administrative arrest — even if based on law, was necessary, proportionate and in compliance with any of the legitimate purposes listed in that provision.

8.5 The Committee notes that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications.[9] It concludes that, in the present case, the rights of the author under article 19 of the Covenant have been violated.

8.6 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to this right is permissible unless it is (a) imposed in conformity with the law and (b) necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.[10] The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.[11]

8.7 In the present case, the Committee must consider whether the restrictions imposed on the author's right to freedom of assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes in the light of the information available on file that the national authorities and the district court have not provided any justification or explanation as to how, in practice, the protest action to which the author was inviting other people would violate the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others, as set out in article 21.

8.8 The Committee notes that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications.[12] It concludes that, in the present case, the State party has violated the author's rights under article 21 of the Covenant.

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[7] See general comment No. 34, para. 22. See also, for example, *Turchenyak et al. v. Belarus* (CCPR/C/108/D/1948/2010), para. 7.7; *Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.3; and *Poplavny and Sudalenko v. Belarus* (CCPR/C/118/D/2139/2012), para. 8.3.

[8] See, for example, *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3; and *Poplavny and Sudalenko v. Belarus*, para. 8.3.

[9] See, for example, *Levinov v. Belarus*, (CCPR/C/117/D/2082/2011), para. 8.3; and *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977–1981, 2010/2010), para. 10.3.

[10] See, for example, *Melnikov v. Belarus* (CCPR/C/120/D/ 2147/2012), para. 8.5.

[11] See *Poplavny v. Belarus*, para. 8; and *Poplavny and Sudalenko v. Belarus*, para. 8.5.

[12] See, for example, *Sudalenko v. Belarus*; *Poplavny v. Belarus*; *Derzhavtsev v. Belarus* (CCPR/C/115/D/2076/2011); *Korol v. Belarus*; *Androsenko v. Belarus*; *Poplavny and Sudalenko v. Belarus*; and *Koreshkov v. Belarus*.

8.9 In the light of the finding above on the unjustified nature of the restrictions of the author's rights under articles 19 and 21 and in the absence of arguments by the State party which explain why it was necessary and proportionate to impose a sentence of administrative arrest on the author for exercising his rights under the Covenant, the Committee finds also that the deprivation of liberty to which the author was subjected was arbitrary in nature and violated his rights under article 9 (1) of the Covenant. The Committee recalls that arrest or detention as punishment for the legitimate exercise of the rights guaranteed by the Covenant, including freedom of opinion and expression and freedom of assembly, is arbitrary.[13]

8.10 Before considering the author's claim under article 14 (3), the Committee must decide whether article 14 (3) is applicable in the present communication, that is, whether the sanctions in the author's case for distributing leaflets concerned "any criminal charge" within the meaning of the Covenant. In that regard, the Committee notes that the author was sentenced to 15 days of administrative arrest for a violation of article 23.34, paragraph 1, of the Belarus Code of Administrative Offences. It further notes that the legal provisions allegedly infringed by the author are directed not towards a given group possessing a special status in the manner, for example, of disciplinary law, but towards anyone who, in his or her capacity as an individual distributes leaflets calling for a protest. The rules proscribe conduct of a certain kind and require that such conduct be subject to a determination of guilt and a sanction that is punitive. The Committee refers to paragraph 15 of its general comment No. 32 (2007), in which it has held that the right to equality and a fair trial extends to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[14] The general character of the rules and the purpose of the penalty, being therefore both a deterrent and punitive, establish that the offence in question was, in terms of article 14 (3) of the Covenant, criminal in nature.

8.11 With regard to the author's claim that his rights were not explained to him by the police when he was detained and that neither the police nor the district court judge allowed the author's representatives to provide him with legal assistance during his detention and trial, the Committee observes that from the police protocol of the administrative offence, it transpires that the police failed to inform the author of his rights, including his right to counsel. The Committee also observes that in his two appeals to the Gomel regional court, the author complained about his representatives not being allowed to participate in his trial, however in their decisions both the appeal court and the court of supervisory review, failed to address that issue. The Committee recalls that article 14 (3) (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. That provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[15] The Committee further recalls that article 14 (3) (d) provides for the right of those accused of an offence that is criminal in nature to defend themselves in person or through legal counsel of their own choosing, or to have legal assistance assigned to them free of charge whenever the interests of justice so require. The Committee considers that in the absence of a reply from the State party, due weight must be given to the author's allegations. It concludes that the denial of access to legal assistance of his choice during his detention and trial stages constitutes a violation of the author's rights under article 14 (3) (b) and (d) of the Covenant.

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 9 (1), 14 (3) (b) and (d), 19 and 21 of the Covenant. The Committee reiterates its conclusion that the State party has also violated its obligations under article 1 of the Optional Protocol.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. That requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation, inter alia, to provide adequate compensation to the author,

[13] See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 17.

[14] See *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), paras. 7.3–7.4.

[15] See general comment No. 32 (2007), para. 32.

as well as appropriate measures of satisfaction. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future and in the light of its obligations under the Optional Protocol to cooperate in good faith with the Committee.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in all official languages in the State party.